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Search and Seizure Bulletin

in this issue:

Expectation of Privacy

Stored Communications Act's "specific and articulable facts" standard applies to historical cell site location data

Citation: *U.S. v. Graham, 2012 WL 691531 (D. Md. 2012)*

Aaron Graham and Eric Jordan were charged with conspiring to rob, and robbing a variety of commercial entities, including a Burger King restaurant and a McDonald's restaurant. Approximately 10 minutes after the McDonald's robbery, Graham and Jordan were apprehended. A handgun and United States currency was recovered from them and from the vehicle. Both Graham and Jordan provided their cellular telephone numbers to the arresting officers.

Two cellular telephones were recovered from the Ford pickup truck. Prior to searching the contents of the phones, Detective Christopher Woerner sought and obtained search warrants for the two phones. The telephone number associated with the one phone matched the number that Graham provided to investigators, and the number associated with the other phone matched the number provided by Jordan.

Federal authorities initially charged the men with only firearm violations. However, an investigation into the robberies and other robberies was ongoing. The government applied for an order pursuant to the Stored Communications Act (SCA), 18 U.S.C.A. §§ 2701 et seq., which ordered Sprint/Nextel, Inc. to disclose to the government "the identification and address of cellular towers (cell site locations) related to the use of [the Defendants' cellular telephones]." The government sought cell site location data for four time periods. In its application, the government alleged that the information sought was relevant to an ongoing criminal investigation regarding the Burger King and McDonald's robberies, as well as several other prior robberies that Graham and Jordan were suspected of committing. By identifying the location of cellular towers accessed by the pair's phones during the relevant time periods, the government sought to more conclusively link the two with the prior robberies.

The government's application was granted. Specifically, the magistrate judge applied the well-defined standard prescribed by the SCA and made a factual finding that the government "offered specific and articulable facts showing that there are reasonable grounds to believe that the records and other information sought are relevant and material to an ongoing criminal investigation."

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While the investigation into the original robberies was ongoing, the grand jury returned a second superseding indictment that included other robberies. The government submitted a second application for cell site data in relation to these other robberies. This application sought all the data acquired as part of the first SCA order, as well as for additional time periods not previously covered. Finding that the government had offered specific and articulable facts in support of the application as required by the SCA, the magistrate judge approved the application. Sprint/Nextel, Inc. complied with the orders, and provided the requested data to the government.

Contributors

Carrie Petersen, J.D.

Alex D. Ruskell, J.D.

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Graham and Jordan filed numerous pretrial motions, including a variety of motions to suppress. At issue here was the "Motion to Suppress Cellular Phone Data and Historical Cell Site Location Data."

DECISION: Motion denied.

The defendants argued that the government's acquisition of historical cell site location data, without a warrant but pursuant to SCA, was in violation of their Fourth Amendment rights and had to be suppressed. They did not argue that the SCA is unconstitutional on its face, but instead make an as-applied challenge and contend that the length of time and extent of the cellular phone monitoring conducted in this case intruded on their expectation of privacy and was therefore unconstitutional. Essentially, they presented the question of whether 24-hour "dragnet" surveillance by emerging technological means infringes on the Fourth Amendment's guarantee against unreasonable searches and seizures.

More specifically, the defendants argued that the first order which authorized the release of 14 days and 1,628 individual cell site location data points, and the second order, which authorized 221 days and 20,235 individual cell site location data points, infringed on the their expectations of privacy insofar as that data allowed the government to paint an intimate picture of their whereabouts over an extensive period of time. While Graham and Jordan did not take issue with any specific data points, they essentially argued that the privacy intrusions available through this type of technology are far reaching and unconstitutional—allowing the government to retroactively track or surveil a suspect through his cellular telephone, a device he likely carries with him at all hours of the day and to constitutionally protected places such as his home or church.

Whether a defendant's Fourth Amendment rights are violated when the government acquires historical cell site location data without a warrant based on probable cause was one of first impression in the district and circuit, but it was not novel. In light of the expanding use of cellular network information by law enforcement, several courts have grappled with the Fourth Amendment implications of cellular phone technology that allow law enforcement to approximate the location of suspects' cellular phones—and by implication, the location of the suspects themselves.

Some courts have concluded that, under certain circumstances, applications seeking cell site location data must be granted only after a showing of probable cause, and not the lower statutory standard of "specific and articulable facts" contained in the SCA.

A majority of courts, on the other hand, have concluded that the acquisition of historical cell site location data pursuant to the SCA's specific and articulable

facts standard does not implicate the Fourth Amendment, regardless of the time period involved. These courts have primarily relied on a line of Supreme Court cases construing the scope of Fourth Amendment rights relating to business records held by third parties.

It appeared to the court that, based on precedent, a five-justice majority of the United States Supreme Court is willing to accept the principle that government surveillance over time *can* implicate an individual's reasonable expectation of privacy. However, the factual differences between the GPS technology considered in the case reviewed and the historical cell site location data in the present case led the district court to proceed with caution in extrapolating too far from the Supreme Court's varied opinions. The court here was limited to applying the facts of this case to the law as currently interpreted.

The standard for evaluating whether a Fourth Amendment search has occurred is whether the individual manifested a subjective expectation of privacy in the place or item searched, and society is willing to recognize that expectation as reasonable. The first question is whether the individual has shown that he sought to preserve something as private. The second question focuses on whether the individual's expectation, viewed objectively, is justifiable under the circumstances.

Section 2703(c) of the SCA addresses "[r]ecords concerning electronic communication service or remote computing service." 18 U.S.C.A. § 2703(c). The Act permits the government to obtain a court order to produce the historical cell site location data at issue in this case. Specifically, the statute states that "a governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity . . . obtains a court order for such disclosure under subsection (d) of this section." A § 2703 order "may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers *specific and articulable facts* showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation."

It is well established that § 2703(c)(1)(B) of the SCA applies to historical cell site location data. The type of data at issue in this case is often considered the "least invasive" type of cellular location information and is "commonly sought" under § 2703. The "specific and articulable facts" standard contained in the SCA is a lesser one than probable cause.

A person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. The Supreme Court has applied this third-party doctrine to a number of scenarios including financial records and dialed telephone numbers. Like financial records form a bank, the historical cell site location records in this case are not the "private papers" of the defendants—instead, they are the "business records" of the cellular providers. Like dialed telephone numbers, the defendants in this case voluntarily transmitted signals to cellular towers in order for their calls to be connected. The cellular provider then created internal records of that data for its own business purposes. The court found that many other courts had explicitly applied the third-party doctrine to historical cell site location records.

The court found that the third-party doctrine was applicable to historical cell site location information.

Editor's Note:

A separate line of Supreme Court cases was also relevant. In U.S. v. Knotts, 460 U.S. 276, 281, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983), the Supreme Court held that "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." The Court concluded that the use of a beeper to track an automobile on public roads did not constitute a search; it merely enhanced law enforcement's ability to track the suspect. The following year, the Court limited that holding, concluding that the use of a beeper in a private residence, which was not open to visual surveillance, was a search that necessitated a warrant. Broadly speaking, said the district court, these cases stand for the proposition that law enforcement conducts a Fourth Amendment "search" when it utilizes tracking technology that allows surveillance in locations that police could not monitor in the absence of that technology. Similarly here, the historical cell site location records at issue identified only the closest cellular tower to the defendants' phones, and not the precise location of the defendants themselves.

In Brief

California

Probable cause

On December 21, 2010, security personnel at a hotel in Los Angeles contacted police about a burglary. A hotel guest reported several items were missing from her room, including a laptop computer and a Blackberry cell phone. Hotel personnel determined that a hotel engineer had unlocked the victim's hotel room

door for two women. The engineer provided a description of the two women. A hotel security officer believed he had previously helped the two women enter a different hotel room, with their key. Hotel personnel also reviewed relevant video surveillance footage. They believed the suspects were still in the hotel.

Los Angeles police officers were directed to the room in which security personnel believed the suspects were staying. At the door, police noticed a "strong smell" of marijuana. One officer smelled marijuana when he was around two or three feet away from the door of the room. An officer knocked on the hotel door. When a woman opened the door, the smell of marijuana was stronger. The officers asked everyone in the room to step into the hallway. Rosland Nadine Torres, Jnaya Nichole Dean, and two men came out of the room. Police then conducted a "protective sweep" of the room. During the sweep, an officer noticed a Blackberry cell phone in plain view. There was a purse on a bed. The top of the purse was open. Inside the officer saw a credit card in the victim's name. The officer looked in the purse to locate an identification card and found Dean's identification. He saw what looked and smelled like marijuana ashes in an ashtray. Police also found a black laptop underneath a mattress.

The women were arrested and charged with burglary and grand theft. They moved to suppress evidence found in the room. At the hearing on the motion, defendants argued there were no exigent circumstances permitting a warrantless entry of the hotel room, and there was no evidence a protective sweep was necessary. The trial court partially denied the suppression motion concluding that a protective sweep rationale did not permit the warrantless entry. However, the court determined there were exigent circumstances justifying the entry. The court stated police officers could lawfully enter the hotel room to prevent marijuana from being destroyed or from "going up in smoke." The trial court concluded evidence of items in plain view was admissible. However, it suppressed evidence of items seized that were not in plain view, including the laptop computer found under a mattress. The women appealed.

DECISION: Reversed and remanded.

Torres and Dean contended that the warrantless entry in this case was not justified by exigent circumstances and the evidence recovered in the hotel room should have been suppressed. The parties focused their arguments on whether the warrantless entry was lawful because the police officers reasonably believed it was necessary to prevent the imminent destruction of evidence.

A guest room in a hotel is considered a home for purposes of the Fourth Amendment. An exigent circumstance is needed for a warrantless entry into one's home regardless of the strength of the probable cause to arrest or the existence of a statute authorizing the arrest. However, the presumption of unreasonableness that attaches to a warrantless entry into the home can be overcome by a showing of one of the few specifically established and well-delineated exceptions to the warrant requirement such as the imminent destruction of evidence or the risk of danger to the police or to other persons inside or outside the dwelling. The United States Supreme Court has indicated that entry into a home based on exigent circumstances requires *probable cause* to believe that the entry is justified by one of these factors.

The people suggest that "in the instant case, where there [were] at least four individuals inside a hotel room having what apparently was a marijuana-smoking party, there was at least probable cause to suspect that the marijuana being possessed was more than a mere ounce." However, the appellate court found no evidence to support this characterization of the circumstances. While in the hotel hallway, the officers did not know how many people were in the room. At most, they had reason to believe the two defendants were present. There simply was no evidence, said the court, suggesting there was a "marijuana-smoking party" taking place inside the hotel room, nor testimony indicating the police officers even suspected such an event. The only evidence adduced was that the police officers smelled a strong odor of burning marijuana. Even assuming the officers observed there were more than two people in the hotel room before the warrantless entry, there was still no evidence suggesting the officers had probable cause to believe the room occupants possessed more than 28.5 grams of marijuana.

Citation: *People v. Torres, 205 Cal. App. 4th 989, 140 Cal. Rptr. 3d 788 (2d Dist. 2012)*

Illinois

Traffic stop

Sergeant Clint Thulen testified at the motion hearing that at approximately 9:30 p.m., he was on duty driving in his squad car. As he attempted to merge onto I-80 eastbound, he saw a Toyota Sequoia traveling parallel to him in the right lane. Instead of passing Thulen's squad car or allowing it to merge in front of him, the driver of the Toyota slowed, moved in front of Thulen, and pulled over onto the shoulder and stopped. Thulen turned on his squad car lights and pulled behind the Toyota. Thulen exited his squad car and approached the Toyota on the passenger's side.

Thulen spoke to Kats, who was the driver of the Toyota, who told Thulen that he had pulled over to change his shoes. At that point, Thulen decided to give Kats a written warning for failure to merge. Kats presented a California driver's license, but the rented ve-

hicle he was driving was registered in Arizona. Thulen examined the rental agreement, which revealed that the vehicle had been rented in Las Vegas for approximately $950. Kats told Thulen that he was moving from Las Vegas to Buffalo, New York. However, Thulen noticed that there were mattresses and other large items in the vehicle which Thulen did not believe were the type of items that people who are moving usually have in their vehicles.

Thulen told Kats that he was going to give him a written warning and asked Kats to accompany him to his squad car while he wrote the ticket. Kats sat next to Thulen in the passenger seat of the squad car. Thulen ran routine computer checks on the driver and the vehicle by radio. The person performing the computer checks informed Thulen that Kats had an FBI number. Thulen claimed that Kats appeared nervous and trembled continuously from the beginning of the traffic stop.

After Thulen wrote the ticket, he and Kats exited the squad car, and Thulen handed Kats the ticket. Kats then began to walk away. Thulen told Kats that the traffic stop was over and that he was free to go and asked if he could ask him a few questions. Thulen asked Kats if there was anything illegal in the vehicle and if there was any possibility that anyone else had put something in the vehicle of which Kats was not aware. Kats answered "no" to both questions. Thulen then asked Kats if he was responsible for everything in the vehicle, and he responded that he was. Thulen then asked if he could search the vehicle and its contents for contraband. Kats answered "yes." Thulen told him that he could wait in the squad car "where it was a little warmer" while Thulen conducted the search. Kats did so.

Thulen began to search the vehicle. Trooper Steen arrived on the scene and the two officers searched the interior of the car together. They found two Motorola "hand held walkie-talkie type" radios, a plane ticket with the name McHugh on it, an energy drink, and fast-food wrappers on the floorboard. However, they did not find any drugs or other contraband visible in the car's interior. Nevertheless, Thulen testified that, based upon his training, education, and experience, the contents of the vehicle and the observations that Thulen had made from the beginning of the traffic stop "led [him] to believe that criminal activity was afoot."

After searching for approximately eight minutes, Thulen went back to his squad car to get a screwdriver. He used it to pop off the dashboard panel because, based to his experience and training, the space behind the dashboard panel is "a likely location for contraband to be hidden." He found no contraband in that location.

Thulen testified that he then looked at the underside of the rear passenger door "a little more carefully" and noticed that the plastic part of the door was pulled slightly away from the metal framework of the door. He used the screwdriver to pry back the plastic part of the door. He saw that the plastic liner had been pulled off and "there were cuts in it." Behind the plastic liner, Thulen could see that there were several "food saver wrapped bundles" lodged in the empty space contained in the metal interior of the door. He used an upholstery tool to pry back the plastic door panel further so he could access the bundles. Thulen recognized the bundles as being consistent with illegal street drugs, and he arrested Kats. Ultimately, the search resulted in the discovery of nine bundles of cannabis weighing more than seven pounds.

Kats was charged and filed a motion to suppress the evidence seized. After the hearing, the trial court denied the motion. However, the trial court subsequently granted the defendant's motion to reconsider and entered an order suppressing the evidence. The state appealed.

DECISION: Reversed.

In his motion, Kats argued that the evidence seized should have been suppressed because the length of his detention during the traffic stop was unreasonable and because the search of his vehicle exceeded the scope of the consent he gave.

The fundamental purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. A seizure that is lawful at its inception can violate the fourth amendment if its manner of execution unreasonably infringes interests protected by the Constitution. For example, a traffic stop that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.

There is no talismatic period of time beyond which an initially justified traffic stop becomes an unreasonable seizure under the Fourth Amendment. However, the brevity of the stop is an important factor when determining whether the stop is reasonable. Courts must consider the purpose to be served by the stop as well as the time reasonably needed to effectuate those purposes. An officer's authority to investigate a traffic violation may not become a subterfuge in order to obtain other evidence merely based on the officer's suspicion.

Applying these standards, the appellate court concluded that the duration of the traffic stop at issue in this case was reasonable. The videotape of the traffic stop showed that approximately nine minutes elapsed from the time that Thulen first spoke to Kats until he handed him the warning ticket and told him that he was free to leave. At that point, the initial seizure was over. Nine minutes is not an unduly long period of time to complete the necessary tasks.

There was also no evidence that Thulen prolonged the traffic stop after handing Kats the ticket in an attempt to obtain incriminating evidence.

Kats did not, and could not, argue that Thulen's subsequent search of the vehicle was somehow a continuation of the initial seizure. Thulen's actions after the initial traffic stop had concluded were not part of the traffic stop and could not be considered in determining whether Thulen unreasonably prolonged the traffic stop. Only those actions that Thulen took during the nine minutes of the initial traffic stop were relevant to that inquiry.

The trial court did not explain why it reversed itself and concluded the duration of the traffic stop was unreasonable. The appellate court found that the record did not support the inference that Thulen unreasonably prolonged the traffic stop.

It is well settled that an individual may consent to a search conducted without a warrant, thereby eliminating the need for probable cause and a search warrant. However, when the police rely upon consent as the basis for a warrantless search, they have no more authority than they have apparently been given by the voluntary consent of the defendant.

The standard for measuring the scope of a suspect's consent is that of "objective reasonableness," which requires consideration of what a "typical reasonable person [would] have understood by the exchange between the officer and the suspect." The scope of a search is defined by its expressed object or purpose.

Applying these standards, courts have determined that an officer may search unlocked containers found inside the area being searched if it would be reasonable to find the stated object of the search in such containers. However, a defendant's general consent to search a vehicle does not necessarily authorize an officer to break into locked containers or otherwise do physical damage to the vehicle in carrying out the search.

Under the facts presented here, the court noted that Thulen's search was within the scope of the consent given by the defendant. Thulen asked Kats if he could search the "vehicle and its contents" for "contraband." Kats answered "yes." It would be reasonable, said the court, to find contraband hidden behind a removable door panel. Thus, a reasonable person in Kats' position would have understood that he had authorized Thulen to search behind the vehicle's door panels, particularly where (as here) the panels could be easily removed and replaced and the search could be accomplished without causing any structural damage to the car.

Citation: *People v. Kats, 2012 IL App (3d) 100683, 359 Ill. Dec. 605, 967 N.E.2d 335 (App. Ct. 3d Dist. 2012)*

Seizure

At trial, Officer Robert Staken testified that on the afternoon of September 8, 2009, he was on patrol with his partner, Officer Brophy, when they spoke to an anonymous citizen. This citizen, an African-American man in his 20s, told them about a tan, four-door Lincoln with three passengers, which contained a gun. At trial, Staken indicated that he did not remember what the man was wearing, his height, or whether the man had facial hair.

Approximately five minutes later, the officers saw a four-door tan Lincoln with three passengers and curbed the vehicle. As the officers approached the vehicle, the driver got out and began walking toward them. This man was ordered back to the vehicle. There, the officers handcuffed the driver and a passenger. Staken then ordered Carl Henderson, who was sitting in the backseat, out of the car. Henderson exited from the driver's side of the vehicle, and, as he was being "passed" to Staken by Brophy, took off running. As he ran away, an object fell to the ground. Once the object was on the ground, Staken realized that it was a handgun.

Staken alerted Brophy that Henderson had dropped a gun, then got into the squad car and chased him. Eventually, Henderson fell to the ground. At that point, Staken exited the car and handcuffed him.

Officer Matthew Brophy testified consistently with Staken regarding the details of the conversation with the anonymous citizen. Although Brophy did not recall what the man was wearing, he did remember that the man was of average height. Brophy's testimony was also consistent with that of Staken regarding the stop of the Lincoln. After Henderson exited the car from the driver's side, Brophy then handed him over to Staken and returned to the other two men. At that point, Henderson began to run away. Brophy later recovered a .22-caliber handgun from the ground approximately two feet away from the Lincoln.

Ultimately, the trial court found Henderson guilty of aggravated unlawful use of a weapon and sentenced him to eight years in prison. On appeal, Henderson contended that the gun dropped during his subsequent flight had to be suppressed as the fruit of an illegal search.

DECISION: Affirmed.

Here, Henderson contended that his rights under the Illinois and United States constitutions were violated when he was illegally seized, and, consequently, the gun dropped during his subsequent flight must be suppressed as the fruit of that illegal seizure. The court found that initial seizure in this case was illegal because it was based on an anonymous tip that was not sufficiently reliable to provide the officers with a reasonable suspicion that Henderson was engaged in

criminal activity which would justify a stop. However, Henderson was seized, then broke away from the officers and ran before he was seized a second time. The state responded that regardless of the legality of the initial stop, he ended that stop when he ran away and he could not later seek to exclude the gun because he was not in custody, i.e., "seized," when he dropped it.

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Similarly, Article I, § 6, of the Illinois Constitution provides that the "people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches [and] seizures." Illinois courts interpret Article I, § 6, in "limited lockstep" with the Fourth Amendment. The Illinois supreme court has explained that the limited lockstep approach is based upon the premise that the drafters of the 1970 constitution intended that the phrase "search and seizure" in the state constitution mean "in general, what the same phrase means in the federal constitution." This approach permits the consideration of state tradition and values as reflected by long-standing case precedent.

In this case, although Henderson argued that his position on appeal rested upon the protections offered by both the Fourth Amendment and the Illinois Constitution, his only citation to authority was for the very general proposition that the Illinois Constitution of 1970 protects a person's right to be free from unreasonable searches and seizures. The court found that he failed to provide any citation to authority or argument as to how this court could interpret Article I, § 6, in a manner contrary to the Fourth Amendment in this situation.

The issue was whether Henderson, at the time that he dropped the gun, was "seized" within the meaning of the Fourth Amendment.

Here, the court said that Henderson was not seized, within the meaning of the Fourth Amendment, at the time that the gun fell to the ground because he chose not to submit to the officers' show of authority, i.e., he chose to run away and the gun fell to the ground after he had broken away and begun to run. Here, the gun Henderson sought to suppress was not discovered by the police during the initial seizure of the Lincoln. Rather, it was discovered after it fell as Henderson was fleeing. In other words, he was not seized within the meaning of the Fourth Amendment at the time that the gun fell to the ground. He was not seized until he was later handcuffed by a police officer. The contraband was not recovered while Henderson was seized because it was cast away after he broke away from the officers and began to run. Thus, said the court, the gun could not be the fruit of an illegal seizure and the trial court properly denied Henderson's motion to suppress.

Citation: *People v. Henderson, 2012 IL App (1st) 101494, 358 Ill. Dec. 806, 965 N.E.2d 1285 (App. Ct. 1st Dist. 2012), appeal allowed (Ill. May 30, 2012)*

Washington

Affidavit

A Yakima District Court judge issued a search warrant for Patrick Lyons' property, based on an affidavit by Yakima Police Department Officer Gary Garza. Officer Garza made the following statement of probable cause in the affidavit:

> Within the last 48 hours a reliable and confidential source of information (CS) contacted [narcotics] Detectives and stated he/she observed narcotics, specifically marijuana, being grown indoors at the listed address. The CS knows the suspect and homeowner as "Jimmy". The CS observed the growing marijuana while inside an outbuilding on the property of the listed residence. The CS observed the marijuana growing in potted soil under active lighting designed to promote plant growth . . . .

When they executed the search warrant, police discovered more than 200 mature marijuana plants maintained in a pole barn on Lyons' property. On the property, police also found small, juvenile marijuana plants, supplies for packaging marijuana, and a large quantity of mushrooms. Lyons was arrested and charged with manufacturing marijuana, possession of mushrooms with intent to deliver, and possession of marijuana with intent to deliver.

Lyons moved to suppress the evidence seized from his property, arguing that the affidavit for search warrant failed to state timely probable cause. The superior court judge found that although the affidavit identified when the officer received the CS's information, it "said nothing about the timing of the informant's observation." The judge held that the affidavit was legally insufficient and the search unlawful and granted Lyons' motion to suppress. The state appealed.

In a two-judge majority opinion, the Court of Appeals reversed the trial court. The majority held that the language in Officer Garza's affidavit, "[w]ithin the last 48 hours," could be read either to apply solely to when the CS contacted police or to apply both to the time of contact and of the CS's observations. The majority went on to hold the standard of review required the language be read to support the warrant. The dissenting judge called this analysis a strained and unnatural reading.

DECISION: Reversed and remanded.

A search warrant shall issue only on probable cause. The warrant must be supported by an affidavit that particularly identifies the place to be searched and items to be seized. To establish probable cause, the affidavit must set forth sufficient facts to convince a reasonable person of the probability the defendant is

engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched. Even though the affidavit may be based on an unidentified informant's tip, the affidavit must contain some of the underlying circumstances that led the informant to believe that evidence could be found at the specified location. In particular, the affidavit must set forth the underlying circumstances specifically enough that the magistrate can independently judge the validity of both the affiant's and informant's conclusions.

The determination of probable cause must be made by a magistrate based on the facts presented to him or her, instead of being made by police officers in the field. The reasons for this rule go to the foundations of the Fourth Amendment. As the United States Supreme Court has said, "[t]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

The facts set forth in the affidavit must support the conclusion that the evidence is probably at the premises to be searched at the time the warrant is issued. The court will evaluate an affidavit in a commonsense manner, rather than hypertechnically, and any doubts are resolved in favor of the warrant. However, the reviewing court must still insist that the magistrate perform his "neutral and detached" function and not serve merely as a rubber stamp for the police.

Of course, some time passes between the officer's or informant's observations of criminal activity and the presentation of the affidavit to the magistrate. The magistrate must decide whether the passage of time is so prolonged that it is no longer probable that a search will reveal criminal activity or evidence, i.e., that the information is stale. The magistrate makes this determination based on the circumstances of each case. Among the factors for assessing staleness are the time between the known criminal activity and the nature and scope of the suspected activity. In the context of a marijuana growing operation, probable cause might still exist despite the passage of a substantial amount of time.

The supreme court noted that the magistrate cannot determine whether observations recited in the affidavit are stale unless the magistrate knows the date of those observations. Federal courts have found two separate statements of time to be important in determining staleness: (1) when the affiant received the tip, and (2) when the informant observed the criminal activity. Commentators have identified the second time frame as the critical one: the time of the facts relied on to establish probable cause.

An affidavit lacking the timing of the necessary observations might still be sufficient if the magistrate can infer recency from other facts and circumstances in the affidavit. However, without such additional facts from which to draw an inference of recency, the affidavit does not provide a magistrate a basis to find probable cause that a crime is now occurring.

The court here had to decide whether the magistrate had enough information to find probable cause that evidence of a marijuana growing operation would still be found on Lyons' property. Did Officer Garza's phrase "[w]ithin the last 48 hours" refer solely to when he received the tip or also to when the informant observed the marijuana growing? The state urged the court to defer to the issuing magistrate. Further, the state argued that the commonsense reading of the affidavit revealed that "[w]ithin the last 48 hours" referred to both the timing of the tip and the informant's observations and any other reading was "hypertechnical." However, said the court, establishing probable cause is not hypertechnical; it is a fundamental constitutional requirement and an ancient guarantee of the sanctity of the home.

Giving great deference to the magistrate did not mean unlimited deference. The supreme court found that the affidavit did not provide a substantial basis for determining probable cause. The affidavit provided no facts to support an inference of recency, the court said.

Regarding the language "[w]ithin the last 48 hours," the court found that it did "not clearly state the time between the informant's observations and the filing of the affidavit." This one key sentence related three separate actions: the CS observed marijuana being grown, the CS contacted the detectives, and the CS reported the observation. There was necessarily a time gap between the observation and the contact with the detectives, but the affidavit gave only one time reference. It was impossible, said the court, for a neutral magistrate to determine how much time passed between observation and the contact and report.

Because the affidavit for search warrant did not relate when the confidential informant observed marijuana growing on Lyons' property, the court found that the affidavit did not provide sufficient support for the magistrate's finding of timely probable cause. Therefore, it held that the trial court did not err in holding that the search warrant was defective and subsequently suppressed the evidence seized.

Citation: *State v. Lyons, 275 P.3d 314 (Wash. 2012)*

